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Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re RAMON MANUEL AGUILAR, On Habeas Corpus.	F070751, F071804 (Super. Ct. Nos. BF156613A, BF158754A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey, Judge, and John S. Somers, Judge.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman, Raymond L. Brosterhous II and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Franson, J. and Meehan, J.

Defendant Ramon Manuel Aguilar appealed, contending two of his prior prison term enhancements should be stricken because the felony convictions underlying them had been reduced to misdemeanors pursuant to Proposition 47. We disagreed and affirmed. The Supreme Court granted review and has now transferred the case back to us to vacate our decision and reconsider in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), filed on July 30, 2018. As we explain, we deem this appeal a petition for writ of habeas corpus (*People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4 [treating appeal as petition for writ of habeas corpus]),[1] and we now conclude the two prior prison term enhancements must be stricken and defendant resentenced.

PROCEDURAL SUMMARY

On October 31, 2014, in case No. BF156613A, defendant pled no contest to felony vandalism (Pen. Code, § 594, subd. (b)(1)).[2] He admitted one prior strike allegation (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and five prior prison term allegations (§ 667.5, subd. (b)), including a 1991 section 666 conviction and a 1992 section 666 conviction. The plea was in exchange for an indicated sentence of eight years in prison (suspended), three years' probation with one year in county jail, and dismissal of his other charges and prior strike allegation.

On November 4, 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).)

On November 21, 2014, defendant filed a Proposition 47 petition to reduce his 1991 and 1992 section 666 convictions to misdemeanors.

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1 The parties do not object to our deeming the appeal a habeas proceeding.

2 All statutory references are to the Penal Code.

On December 3, 2014, the trial court held a sentencing hearing. Defense counsel argued the prior prison term enhancements should be stricken due to Proposition 47. The prosecutor objected. The court stated it would impose the enhancements. The court then sentenced defendant to eight years in prison, as agreed—three years on the vandalism count, plus five years for the five prior prison term enhancements. The court suspended execution of sentence and granted defendant three years of felony probation with one year in county jail.

On December 11, 2014, the trial court granted defendant's Proposition 47 petition, reducing both the 1991 and 1992 section 666 convictions from felonies to misdemeanors.[3]

On December 18, 2014, defendant filed a notice of appeal. He did not request a certificate of probable cause.

On April 1, 2015, defendant pled no contest to a new crime in case No. BF158754A, in exchange for an eight-year sentence to be served concurrently to the

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[3] We grant defendant's motion for judicial notice. Thus, we take judicial notice of the minute orders reflecting defendant's filing of a Proposition 47 petition on November 21, 2014, and the minute orders reflecting the trial court's rulings on the petitions on December 11, 2014.

In his brief, defendant states that "prior to sentencing, he successfully moved to have the petty theft with prior (Pen. Code, § 666) convictions underlying two of these allegations reduced to misdemeanors pursuant to Proposition 47. When the trial court imposed a suspended sentence [defendant] objected to imposition of the corresponding enhancements, but the trial court imposed them anyway." (Fn. omitted.)

We agree that defendant objected at sentencing and raised the issue of Proposition 47, but as far as we can discern from the record (including the minute orders defendant asked us to judicially notice), the trial court did not technically rule on defendant's Proposition 47 petition at the sentencing hearing, but did so several days after sentencing. For this reason, we conclude we should deem the appeal a petition for writ of habeas corpus.

eight-year sentence in case No. BF156613A.[4] Defendant also admitted that commission of the new crime violated his probation in case No. BF156613A.

On April 30, 2015, the trial court sentenced defendant on both cases. In case No. BF156613A, the court ordered execution of the previously suspended eight-year sentence. In case No. BF158754A, the court imposed eight years to be served concurrently to the sentence in case No. BF156613A.

On June 15, 2015, in case No. BF158754A, defendant filed a notice of appeal. He did not request a certificate of probable cause.

On August 24, 2015, we ordered the two cases consolidated.

On August 30, 2016, we filed our opinion in *People v. Aguilar* (August 30, 2016, F070751 & F071804) [nonpub. opn.].

On September 19, 2018, the Supreme Court transferred the opinion back to this court.

DISCUSSION

I. *Buycks* and Prior Prison Term Enhancements

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*Rivera*, *supra*, 233 Cal.App.4th at p. 1091.)

Proposition 47 also created a new resentencing provision, section 1170.18, that provides procedural mechanisms for (1) resentencing of inmates currently serving sentences for Proposition 47-eligible felonies that are now misdemeanors (§ 1170.18, subds. (a), (b)); and (2) designation of Proposition 47-eligible felonies as misdemeanors for persons who have already completed their sentences (§ 1170.18, subds. (f), (g)). (See

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[4] The prior prison term allegations in case No. BF158754A did not include the 1991 and 1992 section 666 convictions at issue here.

Buycks, *supra*, 5 Cal.5th at p. 876; *Rivera*, *supra*, 233 Cal.App.4th at p. 1092.) Once a felony is reduced to a misdemeanor under Proposition 47, it "shall be considered a misdemeanor for all purposes …." (§ 1170.18, subd. (k).)

In *Buycks*, the Supreme Court resolved an issue on which the appellate courts had disagreed—whether a felony reduced to a misdemeanor under Proposition 47 can still function as the basis for a prior prison term enhancement. *Buycks* concluded that "section 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under [Proposition 47]." (*Buycks*, *supra*, 5 Cal.5th at p. 890.)

Buycks noted, however, that the mechanism for addressing these already imposed but now unsupported enhancements is not specified by Proposition 47: "Proposition 47 does not provide a specific mechanism for recalling and resentencing a judgment solely because a felony-based enhancement has been collaterally affected by the reduction of a conviction to a misdemeanor in a separate judgment." (*Buycks*, *supra*, 5 Cal.5th at p. 892.) *Buycks* provided two options for dealing with these enhancements.

First, *Buycks* explained that when a trial court grants a Proposition 47 petition on a current Proposition 47-eligible felony conviction under section 1170.18, subdivision (a), and thus is required to fully resentence the defendant, the court should at that time also reevaluate whether any enhancements in that judgment are no longer applicable because the felony convictions underlying them have also been reduced to misdemeanors under Proposition 47. If so, the court may not reimpose those enhancements "because at that point [a] reduced conviction 'shall be considered a misdemeanor for all purposes.' (§ 1170.18, subd. (k).) Under these limited circumstances, a defendant may … challenge any prison prior enhancement in that judgment if the underlying felony has been reduced to a misdemeanor under Proposition 47, notwithstanding the finality of that judgment." (*Buycks*, *supra*, 5 Cal.5th at pp. 894-895; see *id*. at p. 896.)

Second, *Buycks* explained that even when a defendant petitions only to reduce a Proposition 47-eligible conviction underlying an enhancement, courts are authorized to strike those enhancements: "[A]s to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, … Proposition 47 and the *Estrada* rule authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under [Proposition 47]." (*Buycks*, *supra*, 5 Cal.5th at p. 888.) But *Buycks* noted that in these cases, where there is no resentencing of a current Proposition 47-eligible felony conviction, another mechanism for challenging the enhancement is required. The court resolved this dilemma by concluding that the defendant may seek relief via a petition for writ of habeas corpus under section 1170.18, subdivision (k). (*Buycks*, *supra*, at p. 895.) "[T]he collateral consequences of Proposition 47's mandate to have the redesignated offense 'be considered a misdemeanor for all purposes' can properly be enforced by means of petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect. [¶] [T]he 'misdemeanor for all purposes' language of section 1170.18, subdivision (k), is an ameliorative provision distinct from the ameliorative provisions of subdivisions (a) and (f) of the same statute which provide express mechanisms for reducing felony convictions to misdemeanors." (*Ibid*.) Noting that habeas petitions have been used to afford relief where a collateral attack on enhancements is concerned, *Buycks* concluded a habeas petition is the appropriate vehicle for a defendant to seek relief under such circumstances. (*Id*. at pp. 895-896.)

In this case, the second option applies because the trial court sentenced defendant before granting his Proposition 47 petition to reduce the convictions underlying his prior prison term enhancements, and there was no Proposition 47-eligible current felony to be resentenced. Rather than require defendant to file a petition for writ of habeas corpus in the sentencing court, we conclude the better course is to deem this appeal to be a habeas corpus proceeding.

II. Certificate of Probable Cause

The People argue in their supplemental brief that defendant may not raise this issue because he entered into an agreed-term plea agreement and then failed to obtain a certificate of probable cause.[5] We disagree.

As a general rule, a criminal defendant who enters a guilty or no contest plea with an agreed-upon sentence may not challenge that sentence on appeal unless he or she first obtains a certificate of probable cause from the trial court. (§ 1237.5, subd. (b); *People v. Panizzon* (1996) 13 Cal.4th 68, 76.) Recently, however, based on the foundation of *Harris v. Superior Court* (2016) 1 Cal.5th 984 (*Harris*), courts have held that a certificate of probable cause was not required in cases raising issues under Proposition 57 (requiring a juvenile court to hold a transfer hearing before a juvenile may be charged in adult criminal court) and Senate Bill No. 620 (2017-2018 Reg. Sess.; granting the trial court discretion to strike firearm enhancements), even though the defendants had entered into agreed-term plea agreements. (*People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1078-1079 (*Baldivia*) [Proposition 57]; *People v. Hurlic* (2018) 25 Cal.App.5th 50, 53-54 (*Hurlic*) [Senate Bill No. 620].)

In *Harris*, the defendant had entered into an agreed-term plea agreement. (*Harris*, 1 Cal.5th at p. 987.) Citing *Doe v. Harris* (2013) 57 Cal.4th 64, 66 (*Doe*), the Supreme Court noted " 'the general rule in California is that the plea agreement will be " ' "deemed to incorporate and contemplate not only the existing law but the reserve

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[5] Defendant did not submit a supplemental brief.

power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy ….” ’ ” [Citation.] That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them.’ ” (*Harris*, at p. 990.) *Harris* then concluded the electorate intended Proposition 47 to apply to the parties of a plea agreement (*Harris*, at p. 991), and “the People are not entitled to set aside the plea agreement when defendant seeks to have his sentence recalled under Proposition 47” (*id*. at p. 993).

In *Hurlic*, the court concluded the defendant did not require a certificate of probable cause, despite having entered into an agreed-term plea agreement, to raise a claim that Senate Bill No. 620 (2017-2018 Reg. Sess.) should apply to him. (*Hurlic*, *supra*, 25 Cal.App.5th at pp. 54, 59.) The court explained that a certificate of probable cause is not required “when the defendant’s challenge to the agreed-upon sentence is based on our Legislature’s enactment of a statute that retroactively grants a trial court the discretion to waive a sentencing enhancement that was mandatory at the time it was incorporated into the agreed-upon sentence.” (*Id*. at p. 53.) Citing *Doe* and *Harris*, *Hurlic* noted that “courts will not amend a plea agreement to add ‘ “ ‘an implied promise [that] the defendant will be unaffected by a change in the statutory consequences attending his or her conviction.’ ” ’ [Citation.] Because defendant’s plea agreement does not contain a term incorporating only the law in existence at the time of execution, defendant’s plea agreement will be ‘ “deemed to incorporate” ’ the subsequent enactment of Senate Bill No. 620 (2017-2018 Reg. Sess.), and thus give defendant the benefit of its provisions without calling into question the validity of the plea.” (*Hurlic*, at p. 57, fn. omitted.)

Then, in *Baldivia*, where the defendant also had entered into an agreed-term plea agreement, the appellate court relied on *Doe*, *Harris*, and *Hurlic* to conclude the defendant did not require a certificate of probable cause to raise the issue of whether

Proposition 57 applied to him "because these changes in the law were implicitly incorporated into his plea agreement." (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1074.) In other words, "[the] plea agreement incorporated the possibility that changes in the law would alter the consequences of his plea." (*Id*. at p. 1078.) "Consequently, his contentions [did] not challenge the validity of his plea." (*Id*. at p. 1074.) "If the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements. It follows that defendant's appellate contentions were not an attack on the validity of his plea and did not require a certificate of probable cause." (*Id*. at p. 1079.)

We agree with the reasoning of these cases. And we see nothing in the record to suggest that the plea agreement contained a term requiring the parties to apply only the law in existence at the time the agreement was made. Thus, we deem the agreement to incorporate the subsequent enactment of Proposition 47, giving defendant the benefit of its provisions without calling into question the validity of the plea. We conclude defendant does not require a certificate of probable cause.

III. Discretion to Withdraw Approval of Plea Agreement

Lastly, the People contend that if we do grant relief and remand for resentencing, the trial court will have the discretion both to reexamine defendant's entire sentence and to withdraw the court's former approval of defendant's plea agreement. We agree that on remand the trial court may reconsider the aggregate sentence, but we disagree that it may withdraw its former approval of defendant's plea agreement. As we noted above, the California Supreme Court held in *Harris*, a case not cited by the People, that the plea agreement survives application of the new law and the prosecution is "not entitled to set aside the plea agreement when defendant seeks to have his sentence recalled under Proposition 47." (*Harris, supra*, 1 Cal.5th at p. 993 [Proposition 47 change in law did

not eviscerate underlying plea bargain].) *Harris* explained: "The resentencing process that Proposition 47 established would often prove meaningless if the prosecution could respond to a successful resentencing petition by withdrawing from an underlying plea agreement and reinstating the original charges filed against the [defendant]." (*Harris*, at p. 992.) "One of Proposition 47's primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative. [Citations.] Accepting the People's position [that the prosecution should be allowed to withdraw from the plea agreement] would be at odds with that purpose …. 'If a reduction of a sentence under Proposition 47 results in the reinstatement of the original charges and elimination of the plea agreement, the financial and social benefits of Proposition 47 would not be realized, and the voters' intent and expectations would be frustrated.' " (*Ibid.*; see *Hurlic, supra,* 25 Cal.App.5th at p. 57 [resentencing under Senate Bill No. 620 does not affect the plea bargain and thus the prosecution may not seek to set aside the plea].)

We believe *Harris*'s reasoning applies equally to the prospect of a trial court, rather than a prosecutor, rescinding its former approval of the plea agreement. We conclude the plea agreement was subject to future changes in the law, and the subsequent enactment of Proposition 47 did not eviscerate or invalidate the plea agreement. On remand, neither the parties nor the trial court may reject the plea agreement previously accepted and approved.

IV. Conclusion

We will grant relief and strike the two prior prison term enhancements.

DISPOSITION

The appeal is deemed to be a petition for writ of habeas corpus. The petition is granted. The two prior prison term enhancements (Pen. Code, § 667.5, subd. (b)) based on the 1991 and 1992 Penal Code section 666 convictions are stricken in case No. BF156613A, for a resulting sentence of six years. The matter is remanded to the trial

court for resentencing. The trial court may reconsider the sentence in case No. BF158754A, but the aggregate term of the two cases may not exceed eight years. The court is directed to forward certified copies of the amended abstract of judgment to the appropriate entities.

Defendant's request for judicial notice is granted, as noted above.